**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 657 OF 2001**

Mukeshkumar Ramsagar Mourya
@ Vinaykumar Ramsagar Yadav,
C/12022, Presently lodged at
Yerawada Central Prison, Pune. ...Appellant
(Orig.Accused No.1)

V/s.

The State of Maharashtra.
(Through Dadar Police Station). ...Respondents
(orig.Complainant)

ALONGWITH

**CRIMINAL APPEAL NO. 658 OF 2001**

Ashokkumar Durgaprasad Sony,
C/12023, Presently lodged at
Yerawada Central Prison, Pune. ...Appellant
(Orig.Accused No.2)

V/s.

The State of Maharashtra.
(Through Dadar Police Station). ...Respondents
(orig.Complainant)

Shri L.H. Patil for Appellants.
Shri P.S. Hingorani, APP for the State.

**CORAM : D.G. DESHPANDE &**
**V.M. KANADE, JJ.**

**DATED : 15TH DECEMBER, 2005.**

**ORAL JUDGMENT (PER V.M. KANADE, J.) :-**

. Both these appeals can be disposed of by a

common judgment since the appellants in both these appeals are challenging the Judgment and Order passed by the Session Court at Bombay in Sessions Case No.3/2000 whereby the appellants who are original accused nos.1 and 2 were convicted by the trial Court for the offence punishable under Section 302 of the IPC and were sentenced to suffer R.I. for life and also to pay a fine of Rs.5000/- and in default, to suffer R.I. for one year. The appellants are also convicted for the offence punishable under Sections 449, 450, 307 and 394 of the IPC and sentenced to suffer various other sentences which are more particularly mentioned in the operative part of the order.

2. The prosecution case in brief is that the complainant-PW 2 Maya Kolhatkar and her husband (deceased) were retired employees residing on the first floor of a building known as "Vishva Kutir" situated at Dadar (West). Appellant Mukesh - Original accused no.1, as according to the prosecution, had earlier done some civil work in the flat. According to the prosecution, on 27th September, 1999 at about 12 noon, PW 2 opened

the door. The appellants who were standing outside the door forcibly entered the house and complainant Maya, PW 2 was gagged and pushed inside the flat. After hearing the cries of PW 2, her husband Vasant came out of the drawing room and tried to rescue his wife. Other witnesses viz. PW 1 and PW 4 also arrived at the scene and were unable to control the appellants. According to the prosecution, the appellants caught hold of the legs of the deceased and threw him on the ground, as a result of which, he received injury on the head and died instantaneously. The appellants were apprehended and a doctor who was residing nearby was called. The said doctor (PW 3) examined the injured and declared him dead and PW 2 was given some medical treatment. The information was sent to the Dadar Police Station who arrived at the spot. They drew the spot panchanama and also the panchanama of the arrest of the appellants. The statements of witnesses were recorded. The clothes of the appellants were also seized under the panchanama. The chargesheet was filed. The appellants pleaded not guilty to the said charges. The trial Court convicted the accused as stated hereinabove.

3. It was contended by the learned Counsel appearing on behalf of the appellants that from the perusal of the oral and documentary evidence on record, the prosecution had failed to establish that the appellants had neither the intention of committing the murder of the deceased nor had the knowledge that the injuries which were caused would be sufficient in the ordinary course of nature to cause death. He submitted that from the careful appraisal of the evidence of the prosecution witnesses, it could be seen that the appellants had entered the house not for the purpose of committing the dacoity since the none of the witnesses particularly the complainant had stated in her evidence that the appellants had demanded either money or any other valuables such as jewellery or ornaments from the complainant and her husband. He further submitted that the appellants had come to the house of the complainant in the afternoon at about 12 noon when there was sufficient activity in the building and when the neighbours and other persons were present. He submitted that therefore, this itself created doubt about the

story of the prosecution that the appellants had entered the house for the purpose of committing dacoity. The prosecution has examined seven witnesses. PW 1 Mr.Devdatta Bandivadekar is a witness who had seen the incident after the appellants had entered the flat. He is, therefore, an eye witness to the said incident. PW 2 Mrs.Maya Kolhatkar who is the complainant is also an eye witness who has seen the entire incident. PW 3 Rameshchandra Shah is also an eye witness who had seen the incident after Kolhatkar was assaulted and was lying on the ground with a bleeding injury on his head. PW 4 also is an eye witness who is residing in the same building who had reached the house of PW 2 after having heard commotion. PW 5 Dr.Prashant Samberkar is a doctor who performed the post mortem of the deceased Vasant Kolhatkar. PW 6 Mr.Vinayak Vetal, PSI attached to the police station who recorded the complaint and PW 7 is the P.I. attached to Dadar Police Station Mr.Ravikiran Paradkar.

4. From the evidence of PW 1 to 4, it is established that the appellants are the persons who had

entered the house of the complainant-Mrs.Maya Kolhatkar. The presence of the appellants in the house is also not disputed by the defence. PW 2 Maya has stated that the appellants entered their house, pushed her inside. According to PW 2, after she opened the door and enquired with Vinay why he had come to her house. According to her, Vinay asked her whether Arjun was in the house. She thereafter told him there was no reason why Arjun would be in the house and thereafter, accused Vinay gagged her mouth with one hand and caught hold of her throat with second hand and the second accused followed and he caught hold of her with left hand and twisted her hand. Thereafter, Vinay gave one fist blow on her face as a result of which she fell down and sustained injuries. When she cried for help, her husband came from the drawing room and questioned the accused. PW 2 has stated that Vinay pulled the legs of her husband, as a result, her husband fell own on the ground on his head and suffered head injury. She has stated that in the meantime, Devadatta Bandivadekar (PW 1) came there and the other neighbours also came near the flat and they caught hold of the accused. All the

witnesses have more or less stated the same sequence of events which had transpired on the said date. The question, therefore, which needs to be decided is whether the appellants had committed the offence punishable under Section 302 read with Section 397 of the IPC.

5. In our view, considering the statement of these witnesses, it is difficult to come to a conclusion that the accused had the intention to murder the deceased or had the knowledge that the injuries which were caused were sufficient in the ordinary course of nature to cause death. From the evidence of PW 2, it can be seen that she has stated that the accused Vinay gave a fist blow to her and Vinay pulled the legs of her husband, as a result of which, her husband fell down and sustained injury on his head. Thus, the case of the prosecution that accused no.1 lifted the deceased and threw him on the ground has not been established. PW 2 has merely stated that appellant Vinay i.e. accused no.1 pulled the legs of her husband, as a result of which, he fell down. It is an admitted position that both the

appellants were not carrying any weapon nor they had demanded any amount from the PW 2. The statement of PW 5 Dr.Prashant Samberkar who performed the post mortem further establishes that there was one single injury on the back of the head on the right occipital surface and the doctor has given his opinion that such a injury was possibly as a result of an impact on the head. The evidence of PW 2 is, therefore, corroborated by the medical evidence and it appears to be a case where in this scuffle between the appellant-accused no.1 and the deceased, the later fell down and as a result, the injury was caused on the back of his head. Considering this evidence, in our view, the prosecution has not established that the appellants had committed the offence punishable under Section 302 read with Section 34 of the IPC. The appellants, therefore, will have to be acquitted for the offence punishable under Section 302 and at the highest, it can be said that the said action of the appellant Mukesh alias Vinay, original accused no.1 would fall under Section 304 Part II of the IPC.

6. So far as accused no.2 Ashokkumar is concerned, even according to the eye witnesses, he was not responsible for the injury which was caused to the deceased. There is no evidence to indicate that he shared the intention or object of accused no.1. His conviction is, therefore, under Section 302 of the IPC also is set aside and is converted to conviction under Section 323 of the IPC.

7. There is also no evidence to indicate that the accused no.1 had caused any grievous injury to the complainant PW 2 and therefore, by no stretch of imagination, it can be said that he has committed an offence punishable under Section 307. The conviction, therefore, awarded to accused no.1 by the Sessions Court for the offence punishable under Section 307 is also set aside. The conviction under Section 327 so far as accused no.2 is concerned, in our view, is clearly illegal and that is also set aside. The conviction of the appellants for the offence punishable under Sections 449, 450 also, in our view, is clearly illegal and is liable to be set aside. However, the evidence of the

prosecution witnesses PW 1 to 4 indicates that the appellants had entered the house of the complainant PW 2 and attempt was made to gag PW 2 by accused no.1. Thus, the evidence proves the presence of the accused in the house of the complainant and deceased husband and therefore, the conviction under Section 394 will have to be confirmed.

8. In our view, considering the peculiar facts and circumstances, accused no.1 is sentenced to suffer seven years rigorous imprisonment and fine of Rs.1000/- and in default of payment of fine, to suffer three months rigorous imprisonment for the offence punishable under Section 304 Part II. Accused no.1 is convicted for the offence punishable under Section 394 and is sentenced to suffer rigorous imprisonment for seven years with a fine of Rs.1000/- and in default of payment of fine, to suffer rigorous imprisonment for three months. Accused no. 2 is convicted for the offence under Section 323 of the IPC and is sentenced to three years rigorous imprisonment. He is also convicted for the offence

under Section 452 of the IPC and is sentenced to suffer rigorous imprisonment for three years. Accused No.2 is acquitted for the offence punishable under Section 394 of the IPC. The Judgment and order passed by the Sessions Court is, accordingly, modified. The appeal is partly allowed. Accused no.2 is already in custody since the date of his arrest i.e. on 27th September, 1999. Therefore, he be set at liberty forthwith, if not required any other case. The appellant Mukesh Mourya will get the benefit of period which he had undergone in jail and that period shall be set off towards the sentence which had been awarded by this Court.

. Both the appeals are allowed in the above terms.

**(D.G. DESHPANDE, J.)**

**(V.M. KANADE, J.)**